## NTE Engineering Sdn Bhd v Distinctive Properties Sdn Bhd

HIGH COURT (SHAH ALAM) — WRIT NO BA-22C-5–02 OF 2018
VAZEER ALAM J
11 FEBRUARY 2019

*Civil Procedure — Interim preservation of property — Application for — Plaintiff completed construction works as agreed with defendant — Defendant did not make payment on two tax invoices and retention sum — Whether payments should be paid by defendant to plaintiff — Whether ought to be granted — Rules of Court O 29 r 2(1)*

*Civil Procedure — Striking out — Application to strike out plaintiff's application — Plaintiff applied for preservation of property — Defendants applied to strike out plaintiff's application — Whether plain and obvious case to strike out — Whether plaintiff's statement of claim scandalous, frivolous, vexatious or abuse of process — Rules of Court O 18 r 19(b) & (d)*

This was an application in respect of two notices of application ie encl 7, which was the plaintiff's application for preservation of property which was the subject matter of the cause under O 29 r 2(1) of the Rules of Court 2012 ('the ROC'); and encl 9, which was the defendant's application to strike out the plaintiff's claim under O 18 r 19(1)(b) and (d) of the ROC. The defendant was the owner/developer of a mixed commercial and residential development in Johor Bahru, Johor ('the project'). The defendant had originally employed a company known as Sara Timur Sdn Bhd as the main contractor for the project. Subsequently, the defendant appointed Miracle Asset Builder Sdn Bhd ('the main contractor') as the new main contractor for the project in replacement of Sara Timur Sdn Bhd. The defendant and the main contractor entered into a Standard Form PAM Contract 2006 (With Quantities). The plaintiff was listed as one of the nominated subcontractors for the purpose of carrying out and completing specialist subcontract works ('the subcontract works'). Pursuant to the aforesaid contract, the main contractor had then appointed the plaintiff as a nominated subcontractor for the purpose of carrying out and completing the subcontract works. Prior to commencement of the subcontract works, the plaintiff contended that it was agreed between the plaintiff and defendant that all payments due to the plaintiff for the subcontract works and any variations works thereof would be paid directly to the plaintiff as the nominated subcontractor by the defendant as owner/developer of the project ('the direct payment agreement'). The plaintiff alleged that in breach of the direct payment agreement, the defendant did not make payment on two tax invoices, ie for progress claim Nos 19 and 20. The defendant vide an email

A informed the plaintiff that it had received a notice from the main contractor instructing the defendant not to make payment on the two tax invoices for progress payment Nos 19 and 20, and gave notice of termination of the direct payment arrangements to all nominated subcontractors. The plaintiff claimed that the first moiety of the retention sum was also due and payable. Hence, this
B application by the plaintiff. The defendant's primary defence was that there was no privity of contract between the plaintiff and the defendant and therefore argued that the present claim was misconceived in law and was an abuse of process. Hence, the defendant had filed encl 9 to strike out the claim.

C **Held**, allowing encl 7 and dismissing encl 9:

(1) This was not a plain and obvious case for striking out. The court did not find that the statement of claim was scandalous, frivolous or vexatious, nor was it an abuse of process. The plaintiff had raised the issue of
D estoppel by conduct in its pleadings against the defendant. The plaintiff had presented an arguable case for trial and it was clear that this was not a plain and obvious case of a lack of privity of contract. Thus, the court dismissed encl 9 with cost (see para 17).

(2) The plaintiff had established a serious question to be tried, ie whether the
E payments, including the first monies should be paid by the defendant to the plaintiff, thus fulfilling the first legal criteria for the issuance of an interim preservation order (see para 21).

(3) The balance of convenience lied in favour the plaintiff in that if the
F defendant were to release the payments to the main contractor, and the plaintiff were to succeed at trial, then it would bring about undue hardship to the plaintiff, as its success would be barren. In this regard, the court did not find any prejudice or hardship to the defendant in preserving the monies claimed by the plaintiff until disposal of this claim,
G for by its stand taken in the email, the defendant acknowledged the right of the plaintiff to the monies sought to be preserved. No injustice would be suffered by the defendant by the granting of the order (see para 22).

(4) There was no requirement for the undertaking from the plaintiff as to damages for the grant of the interim preservation order if the injustice
H that could be caused to the plaintiff was far greater than if the preservation order was not allowed. Hence, the court allowed encl 7 (see paras 23–24).

**[Bahasa Malaysia summary**

I Ini adalah permohonan berkenaan dengan dua notis permohonan iaitu lampiran 7, iaitu permohonan plaintif untuk pemeliharaan harta yang menjadi perkara kausa di bawah A 29 k 2(1) Kaedah-Kaedah Mahkamah 2012 ('KKM'); dan lampiran 9, yang merupakan permohonan defendan untuk membatalkan tuntutan plaintif di bawah A 18 k 19(1)(b) dan (d) KKM.

Defendan adalah pemilik/pemaju pembangunan komersial dan perumahan campuran di Johor Bahru, Johor ('projek'). Defendan pada asalnya mengambil sebuah syarikat yang dikenali sebagai Sara Timur Sdn Bhd sebagai kontraktor utama untuk projek tersebut. Seterusnya, defendan melantik Miracle Asset Builder Sdn Bhd ('kontraktor utama') sebagai kontraktor utama baru bagi projek itu dalam menggantikan Sara Timur Sdn Bhd. Defendan dan kontraktor utama menandatangani Standard Form PAM Contract 2006 (With Quantities). Plaintif telah disenaraikan sebagai salah satu subkontraktor yang dinamakan untuk tujuan menjalankan dan menyelesaikan kerja subkontrak pakar ('kerja subkontrak'). Selaras dengan kontrak yang disebut terdahulu, kontraktor utama kemudiannya melantik plaintif sebagai subkontraktor yang dinamakan untuk tujuan menjalankan dan menyelesaikan kerja subkontrak. Sebelum memulakan kerja subkontrak, plaintif menegaskan bahawa ia telah dipersetujui antara plaintif dan defendan bahawa semua pembayaran yang perlu dibayar kepada plaintif bagi kerja subkontrak dan apa-apa kerja pelbagai yang akan dilakukannya akan dibayar secara langsung kepada plaintif seperti yang dinamakan subkontraktor oleh defendan sebagai pemilik/pemaju projek ('perjanjian pembayaran langsung'). Plaintif mendakwa bahawa dengan pelanggaran perjanjian pembayaran langsung, defendan tidak membuat pembayaran ke atas dua invois cukai, iaitu tuntutan kemajuan No 19 dan No 20. Defendan melalui e-mel memberitahu plaintif bahawa ia telah menerima notis daripada kontraktor utama yang memerintahkan defendan untuk tidak membuat bayaran ke atas dua invois cukai untuk tuntutan kemajuan No 19 dan No 20, dan memberikan notis penamatan pengaturan pembayaran langsung kepada semua subkontraktor yang dinamakan. Plaintif mendakwa bahawa separuh bahagian pertama wang tahanan juga terhutang dan perlu dibayar. Oleh itu, permohonan ini oleh plaintif. Pembelaan utama defendan adalah bahawa tidak ada persetujuan kontrak antara plaintif dan defendan dan oleh itu berpendapat bahawa tuntutan ini telah salah anggap dalam undang-undang dan merupakan penyalahgunaan proses. Oleh itu, defendan telah memfailkan lampiran 9 untuk membatalkan tuntutan tersebut.

**Diputuskan**, membenarkan lampiran 7 dan menolak lampiran 9:

(1) Ini bukan kes yang nyata dan jelas untuk dibatalkan. Mahkamah tidak mendapati bahawa penyataan tuntutan itu adalah bersifat skandal, remeh atau menyusahkan, ataupun merupakan satu penyalahgunaan proses. Plaintif telah menimbulkan isu estopel dengan kelakuan dalam pliding terhadap defendan. Plaintif telah mengemukakan satu kes yang boleh dibicarakan untuk perbicaraan dan jelas bahawa ini bukan kes yang nyata dan jelas ketiadaan persetujuan kontrak. Oleh itu, mahkamah menolak lampiran 9 dengan kos (lihat perenggan 17).

(2) Plaintif telah menimbulkan persoalan yang serius untuk dibicarakan, iaitu sama ada pembayaran, termasuk wang pertama harus dibayar oleh defendan kepada plaintif, sehingga memenuhi kriteria hukum pertama

untuk pengeluaran perintah pemeliharaan sementara (lihat perenggan 21).

(3) Imbangan kemudahan memihak kepada plaintif bahawa jika defendan akan melepaskan pembayaran kepada kontraktor utama, dan plaintif berjaya pada perbicaraan, maka ia akan membawa kesusahan yang tidak wajar kepada plaintif, kerana kejayaannya akan tandus. Dalam hal ini, mahkamah tidak mendapati apa-apa prejudis atau kesusahan kepada defendan dalam memelihara wang yang dituntut oleh plaintif sehingga pelupusan tuntutan ini, kerana dengan pendiriannya yang diambil dalam e mel, defendan mengakui hak plaintif kepada wang yang dipohon untuk dipelihara. Tiada ketidakadilan yang akan dialami oleh defendan oleh pemberian perintah itu (lihat perenggan 22).

(4) Tidak ada keperluan untuk akujanji daripada plaintif untuk ganti rugi bagi pemberian perintah pemeliharaan sementara jika ketidakadilan yang boleh menyebabkan plaintif jauh lebih besar daripada jika perintah pemeliharaan tidak dibenarkan. Oleh itu, mahkamah membenarkan lampiran 7 (lihat perenggan 23–24).]

**Cases referred to**

*BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70; [2000] 2 CLJ 197, CA (refd)

*Bakar Ahmad v Subramaniam Kanniah* [1992] 2 CLJ Rep 154, HC (refd)

*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 1 MLRA 611, SC (refd)

*Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90, HC (refd)

*Dato' Tan Toh Hua & Ors v Tan Toh Hong & Ors* [2001] 1 MLJ 369; [2001] 1 AMR 792, CA (refd)

*HTC Global Services MSC Sdn Bhd v Kompakar Ebiz Sdn Bhd* [2011] 9 MLJ 572, HC (refd)

*Polini v Gray* (1879) 12 ChD 438, CA (refd)

*Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor* [2012] 3 MLJ 422, CA (refd)

*Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1, FC (refd)

*Tan Chong Keat Sdn Bhd v Pintar Pintas Sdn Bhd* [2005] 4 MLJ 201; [2005] 2 CLJ 863, CA (refd)

*Tan Sri Datuk Dr Mohan Swami & Anor v MISL & Associates Sdn Bhd (No 3)* [2003] MLJU 414; [2003] 7 CLJ 482, HC (refd)

*Teknik Cekap Sdn Bhd v Villa Genting Development Sdn Bhd* [2000] 6 MLJ 513; [2000] 7 CLJ 385, HC (refd)

**Legislation referred to**

Rules of Court 2012 O 18 r 19(1)(b), (1)(d), O 29 r 2(1), (2), (3), (4), O 29 r 3

*(GH Tee & Co) for the applicant.*
*(Lee Kuan Mang & Co) for the respondent.*

**Vazeer Alam J:**

**[1]** This judgment is in respect of two notices of application, that is:

(a) encl 7, which is the plaintiff's application for preservation of property which is the subject matter of the cause under O 29 r 2(1) of the Rules of Court 2012 ('the ROC'); and

(b) encl 9, which is the defendant's application to strike out the plaintiff's claim under O 18 r 19(1)(b) and (d) of the ROC.

**[2]** I had allowed encl 7 and dismissed encl 9. These are my reasons for the decisions.

**[3]** The defendant is the owner/developer of a mixed commercial and residential development in Johor Bahru, Johor ('project'). The defendant had originally employed a company known as Sara Timur Sdn Bhd as the main contractor for the project. Subsequently, vide letter of award dated 23 April 2015, the defendant appointed Miracle Asset Builder Sdn Bhd ('main contractor') as the new main contractor for the project in replacement of Sara Timur Sdn Bhd. The defendant and the main contractor entered into a standard form PAM contract 2006 (With Quantities). Clause 9.0 of the said letter of award dated 23 April 2015, in respect of nominated subcontractors, reads as follows:

> 9.0 You agreed that the nominated sub-contract arrangement for the various sub-contract works and your entitlement for profit and attendance shall be as listed in Appendix B of this Letter of Award.
>
> You will be required to enter into a formal sub-contract agreement with each and every nominated sub-contractor as listed in the said Appendix B in due course based on Standard PAM Sub-Contract 2006 (for use where the Sub-Contract is nominated under the PAM Contract 2006).

And in Appendix B to the letter of award dated 23 April 2015, the plaintiff is listed as one of the nominated subcontractors for the purpose of carrying out and completing specialist subcontract works known as 'Supply, Delivery, Installation, Testing and Commissioning of the Balance of the Fire Protection Services, Internal Plumbing and Sanitary Services and Swimming M&E

Services' ('the subcontract works'). The contract value for the subcontract works is stated in Appendix B as RM7,928,000, and the main contractor is allowed a 1.50% profit for attendance in respect of the subcontract works, ie the sum of RM118,920.

**[4]** Pursuant to the aforesaid contract, the main contractor had then vide its letter of award dated 9 June 2015 ('LOA') appointed the plaintiff as a nominated subcontractor for the purpose of carrying out and completing the subcontract works. The contract value for the subcontract works stated in the LOA was RM7,928,000, exclusive of goods and service tax ('GST').

**[5]** Prior to commencement of the subcontract works, the plaintiff contends that it was agreed between the plaintiff and defendant that all payments due to the plaintiff for the subcontract works and any variations works thereof would be paid directly to the plaintiff as the nominated subcontractor by the defendant as owner/developer of the project ('direct payment agreement').

**[6]** Reflective of the direct payment agreement, the main contractor had agreed with the defendant vide letter dated 29 June 2015 that payments for the subcontract works shall be paid by the defendant directly to the plaintiff. Hence, the plaintiff argues that there is place an agreement between the plaintiff and defendant, which is countenanced by the main contractor, that all payments for the subcontract works shall be paid directly by the defendant to the plaintiff.

**[7]** The plaintiff states that in reliance of the direct payment agreement, and the confirmation of the same by the main contractor, the plaintiff commenced the subcontract works including all variation works and completed the works. The project, including the subcontract works, was completed and the architect issued the certificate of practical completion on 8 February 2017.

**[8]** The plaintiff states that after completion of each specified stage of work, the plaintiff would issue its progress claim for approval. Thereafter, the M&E consultant engineer, quantity surveyor and architect would value the progress claim and give their approval and issue the interim payment certificate. Upon receipt of the interim payment certificate, the plaintiff would issue its tax invoice to the defendant for payment of the respective progress claim supported by the interim payment certificate. Hence, the amount claimed in the tax invoice would be the certified amount as stated in the interim payment certificate.

**[9]** The plaintiff had issued progress claims Nos 1–18 for the specified subcontract works and the consultants had issued interim payment certificates for all of them. Accordingly, the plaintiff had raised tax invoices for all these

progress claims No 1–18, and the defendant had honoured the direct payment agreement by paying the plaintiff directly the amounts claimed in all these tax invoices.

**[10]** The plaintiff states that for almost two years, ie from 25 June 2015–21 February 2017, the direct payment agreement was honoured by the defendant without any question or protest and all the tax invoices addressed to defendant were paid. The defendant never rejected any of these tax invoices nor complain that the tax invoices were wrongly send to them for payment.

**[11]** The plaintiff, in keeping with the prevalent practice, forwarded two tax invoices, ie for progress claim No 19 and No 20 valued at RM339,707.37 and RM410,813.11 respectively, to the defendant for payment. These two tax invoices were issued on 25 January 2017 and 30 March 2017 after valuation by the consultants and issuance of the interim payment certificates. The plaintiff alleges that in breach of the direct payment agreement, the defendant did not make payment on these two tax invoices. Some nine months after the tax invoice for progress payment No 19 and seven months after the tax invoice for progress payment No 20 were sent, the defendant vide an email dated 3 October 2017 informed the plaintiff that it had received a notice dated 23 August 2017 from the main contractor instructing the defendant not to make payment on the two tax invoices for progress payment No 19 and No 20, and gave notice of termination of the direct payment arrangements to all nominated subcontractors.

**[12]** The plaintiff argues that since neither the defendant nor the main contractor had raised any objections to the tax invoice for progress payment No 19 and tax invoice for progress payment No 20, which had been approved by the consultants, for such a long period of time, and on account of the direct payment agreement, they are now estopped from denying that payment is due to the plaintiff. In this regard, learned counsel for the plaintiff has referred the court to the case of *HTC Global Services MSC Sdn Bhd v Kompakar Ebiz Sdn Bhd* [2011] 9 MLJ 572 where the court had held that 'it is the duty of defendant to object to the invoices that had been issued and received by them and having failed to do so the same principle of estoppels will apply'.

**[13]** The plaintiff further relies on the content of the said email dated 3 October 2017 from the defendant and submits that there are clear admissions in that email to the effect that the defendant owes a legal obligation to the plaintiff to make good on the payments due and payable under the two tax invoices. The following passages of the email are relevant this regard:

Paragraph 2:

A Miracle Asset Builder SB (MAB) had on 23 August 2017 issued us an instruction to stop direct payment to the NSC and we have been instructed to cancel the cheques which we have issued to pay the NSCs ...

B Paragraph 2:

We have decided against doing this until and unless we met up with the NSCs and seek your consent ...

C Paragraph 2:

All present agreed that Distinctive Properties Sdn Bhd (DPSB) should not pay the amount due to them to the main contractor.

D Paragraph 2:

In addition to this decision the following were also discussed and decided upon: ...

Item 2 (p 2 of email):

E They further informed that at the point of award of the project, all of them insisted that they wanted direct payment from the client and not through the main contractor ... MAB agreed on this arrangement and had given a letter to the client on direct payment arrangement. Hence, it is not right for MAB to give the client another letter to cancel their agreement of direct payment by the client to the NSCs. They feel that DPSB should continue with the direct payment arrangement.

F

Item 3 (p 2 of the email):

G The NSCs have also submitted to the client the tax invoices for works certified way back in March 2017 ... The current payment by the developer to the NSCs are for overdue payment and there is no reason why MAB should put a stop to such payment. It is not for works done and not certified yet or works carried out after MAB letter dated 21 August to stop direct payment.

H Item 5 (p 2 of the email):

... and the amount of work certified plus Tax invoices were also given to us by the NSCs way back before MAB issued us the letter us the letter dated 21 August 2017 instructing us to stop payment ...

I

Final paragraph:

DPSB is grateful on the cooperation of the NSCs and promised to find amicable ways to continue paying the NSCs directly.

**[14]** The plaintiff claims that in addition to the payments due under the tax invoices for progress payments No 19 and No 20, the first moiety of the retention sum amounting to RM198,200 is also due and payable. The retention sum was the percentage of retained amount on value of work already done and certified by the consultants. The plaintiff submits that since the certificate of practical completion was issued on 8 February 2017, under the terms of the LOA the first moiety of 2.5% is due and payable. The plaintiff also claims this amount, which is being retained by the defendant, be paid to the plaintiff under the direct payment agreement. In this regard learned counsel has referred to the Court of Appeal decision in *Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor* [2012] 3 MLJ 422, where is was held that the 'retention monies by their nature and purpose, are trust monies, ... the retention monies held by the appellant must be held in its capacity as a fiduciary ...'. Hence, counsel argues that as trustee, the defendant has a legal obligation to disburse the first moiety of the retention sum when it became payable under the terms of the LOA.

**[15]** In this case, the certificate of practical completion was issued by the architect well before the defendant received the said letter dated 23 August 2017 from the main contractor to terminate the direct payment agreement. Thus, the plaintiff asserts that the cause of action against the defendant in respect of the liability to make payment of the first moiety arose six months before the purported termination of the direct payment agreement by the main contractor, and as such the purported termination cannot extinguish or cancel an existing liability of indebtedness and/or fiduciary relationship to make payment of the first moiety.

**[16]** The defendant's primary defence is that there is no privity of contract between the plaintiff and the defendant and therefore argues that the present claim is misconceived in law and is an abuse of process. Hence, the defendant has filed encl 9 to strike out the claim. In this regard, learned counsel for the defendant has referred to cl 27.6 of the conditions of PAM form of contract between the main contractor and the defendant which allows for the defendant to make direct payment to any nominated subcontractor and cl 27.10 which states that any election by the defendant to make such direct payment does not create any privity of contract between the defendant and the nominated subcontractor. Hence, based on this contractual provision in the main contract, counsel for the defendant argues that there is no privity of contract between the defendant and the plaintiff, who is a nominated subcontractor, and as such submits that there is no cause of action against the defendant. I find that, not withstanding cl 27.10 in the main contract, by conduct of parties the plaintiff has shown an arguable case that there is a contractual arrangement between the plaintiff and defendant that payments for subcontract works would be paid directly from the defendant to the plaintiff. This, in my

considered view would have to be tested at trial of the action. The contractual stipulation between the defendant and the main contractor in their contract cannot be a basis to deny the existence of any agreement between the plaintiff and the defendant, if indeed the factual averments of the plaintiff as to the existence of direct payment agreement can be proved at trial.

**[17]** The law on striking out is well settled. It is trite that for an applicant to succeed in striking out pleadings, it has to be shown that the said pleadings are plainly and obviously unsustainable. See the Federal Court decision in *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1, which affirmed the principles enunciated by the Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 1 MLRA 611. Having considered the facts, law and submissions, I find that this is not a plain and obvious case for striking out. I do not find that the statement of claim is scandalous, frivolous or vexatious, nor is it an abuse of process. The plaintiff has pleaded an agreement with the defendant for the direct payments to be made. The plaintiff had further pleaded that it had agreed to carry of the subcontract works only upon the defendant's agreement to effect direct payments for work done and certified by the consultants. There is an established pattern of payments as the defendant had made direct payments for 18 progress claims. Hence, the plaintiff has raised the issue of estoppel by conduct in its pleadings against the defendant. The plaintiff has also pleaded the fact that the subcontract works had been practically completed and that the progress claims Nos 19 and 20 are due for payment, and that the defendant had the cheques ready to effect the payment, if not for the belated notice from the main contractor stopping all direct payments to the NSCs. The plaintiff has also shown on affidavit evidence that it is entitled to be paid the first moiety of the retention sum, which is being held by the defendant as trustee for the plaintiff. Hence, on the totality of the facts pleaded and the evidence shown in the affidavits, I find that the plaintiff has presented an arguable case for trial and it is clear that this is not a plain and obvious case of a lack of privity of contract. Thus, I dismissed encl 9 with cost.

**[18]** As for the plaintiff's application for interim preservation of property under O 29 r 2(1) of the ROC vide encl 7, I find that the plaintiff has established a case for the grant of an order directing the defendant to preserve the sums due under the progress claim No 19 and No 20 for RM339,707.37 and RM410,813.11 respectively, and also to preserve the sum of RM198,200 being the first moiety of the retention sum until disposal of the action.

**[19]** The Court of Appeal in *Tan Chong Keat Sdn Bhd v Pintar Pintas Sdn Bhd* [2005] 4 MLJ 201; [2005] 2 CLJ 863 held that the principles applicable for interlocutory injunctions would equally apply to applications for interim preservation of property under O 29 r 2(1), as is the case here. The Court of

Appeal in that case held as follows:

> In *Caltex Oil Malaysia Ltd v Tee Than Song* [1969] 2 MLJ 184 Raja Azlan Shah J (as His Royal Highness then was) said (at p 185):
>
> > It is established law that a court upon an application for an interlocutory injunction in support of a legal right will deal with the injunction upon the affidavits and documents verified thereby and will confine itself directly with the immediate object sought, in order to leave the ultimate question between the parties to be decided on evidence adduced at the trial.
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> In *Lian Keow Sdn Bhd v Overseas Credit Finance Bhd* [1982] 2 MLJ 162Salleh Abas FJ (as His Lordship then was) said (at p 163):
>
> > An interlocutory injunction is a temporary and discretionary remedy. To consider whether to grant it or to refuse it the court is not concerned with the chances of success or failure of the appellants in proving their civil suit at the forthcoming trial, neither is the court's function to evaluate the evidence and materials before it for that purpose. *The court is simply concerned with what it has to do in the meantime in order to protect the rights of the parties so that no irreparable injury would be caused to either of them*. Further whilst the court is not concerned with such questions the court must however, be satisfied that there are serious questions to be gone into that suit, lest an application for an injunction should be made on frivolous and vexatious grounds (*American Cynamid v Eithicon Ltd*).
>
> We are of the view that the above principles would equally apply to applications for the preservation of property which is the subject-matter of the cause or matter made pursuant to O 29 r 2 of the Rules. Just as an application for injunction, an application for the preservation of property is a pre-trial remedy.

**[20]** Order 29 r 2(1) reads:

> (1) On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any property which is the subject-matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter.

And O 29 r 3 reads:

> (3) Where the right of any party to a specific fund is in dispute in a cause or matter, the Court may, on the application of a party to the cause or matter, order the fund to be paid into Court or otherwise secured.

An applicant may apply for an order under O 29 r 2(1) if he manages to show that he has equitable interest in the property. See *Tan Sri Datuk Dr Mohan Swami & Anor v MISL & Associates Sdn Bhd (No 3)* [2003] MLJU 414; [2003] 7 CLJ 482. And O 29 r 2(4) allows the court to impose such terms as it thinks just when orders under O 29 r 2(1), 2(2) and 2(3) are made. See *Bakar Ahmad*

*v Subramaniam Kanniah* [1992] 2 CLJ Rep 154. In *Polini v Gray* (1879) 12 ChD 438 Jessel MR was of the view that the court's jurisdiction to make interlocutory orders extends to protection of funds in order to ensure that the successful party in the litigation does not 'obtain merely a barren success'. See also *Teknik Cekap Sdn Bhd v Villa Genting Development Sdn Bhd* [2000] 6 MLJ 513; [2000] 7 CLJ 385. It is settled law that whether or not such orders ought to be granted must be based on where the balance of justice lies. In the words of Gopal Sri Ram JCA in the case of *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70; [2000] 2 CLJ 197, 'At the end of the day the court has to determine where the justice of the particular case lies'.

**[21]** The fact of the matter is that progress claims Nos 19 and No 20 have been approved for payment by the consultants and the interim payment certificates in respect of these claims have been issued. Hence, there is no question that the plaintiff is entitled to these payments. The only question is whether the direct payment agreement between the plaintiff and defendant exists in law, in which case these monies which are in the custody of the defendant would have to be paid to the plaintiff directly. If the court were to find after trial that the direct payment agreement does not exist, then these payments would be made to the main contractor, which the main contractor has now demanded for, and the plaintiff would have to take the matter of the payment for progress claims Nos 19 and 20 with the main contractor. That could be determined only after trial. In the interim, I find that the plaintiff has established a serious question to be tried, ie whether these payments, including the first moiety should be paid by the defendant to the plaintiff, thus fulfilling the first legal criteria for the issuance of an interim preservation order.

**[22]** I further find that the balance of convenience lies in favour the plaintiff in that if the defendant were to release these payments to the main contractor, and the plaintiff were to succeed at trial, then it would bring about undue hardship to the plaintiff, as its success would be barren. In fact, the defendant in the email dated 3 October 2017 states clearly that they were not too pleased with the stand taken by the main contractor to stop the direct payments to the plaintiff. The defendant was prepared to make payment on the two tax invoices to the plaintiff until the main contractor's letter requesting a stop to the direct payment, not just to the plaintiff but to all other nominated subcontractors as well. In this regard, I do not find any prejudice or hardship to the defendant in preserving the monies claimed by the plaintiff until disposal of this claim, for by its stand taken in the aforesaid email, the defendant acknowledges the right of the plaintiff to the monies sought to be preserved. Hence, I cannot see how the defendant can be prejudiced by an order such as sought in encl 7. I find that no injustice would be suffered by the defendant by the granting of the order. On the facts, there is a risk of greater injustice to the plaintiff if an interim order is not granted to preserve the funds. The defendant, on the other hand, would

not suffer any prejudice because the fund would be in the safekeeping of its own solicitors.

**[23]** The defendant's counsel has raised the issue of the lack of a meaningful undertaking from the plaintiff as to damages for the grant of the interim preservation order, as such an undertaking would be required for the grant of an interim injunction. In this regard, I agree with counsel for the plaintiff that there is no requirement for the undertaking if the injustice that could be caused to the plaintiff was far greater than if the preservation order was not allowed. The mere lack of a cross undertaking as to damages would not by itself be fatal to an application under O 29 r 2(1). See *Dato' Tan Toh Hua & Ors v Tan Toh Hong & Ors* [2001] 1 MLJ 369; [2001] 1 AMR 792; *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90.

**[24]** Wherefore, I allowed encl 7 and ordered that the defendant deposit the sum of RM720,520.48 being the sums due under the two tax invoices for progress claims No 19 and No 20, and the sum of RM198,200 being the first moiety of the retention sum, into an interest bearing stakeholder's account in the name of Messrs GH Tee & Co, the solicitors for the defendant, until disposal of this action and/or further order.

*Enclosure 7 allowed and encl 9 dismissed.*

Reported by Ahmad Ismail Illman Mohd Razali